

**STATE OF INDIANA  
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION**

<b>IN THE MATTER OF</b>	)	
<b>THE PERMIT OF</b>	)	
	)	
<b>C.H. McCLOUD CORPORATION</b>	)	
<b>d/b/a THE LIBRARY IRISH PUB</b>	)	<b>PERMIT NO. RR71-02356</b>
<b>113 EAST WAYNE STREET</b>	)	
<b>SOUTH BEND, INDIANA 46601</b>	)	
	)	

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**I. BACKGROUND OF THE CASE**

C.H. McCloud Corporation, d/b/a The Library Irish Pub, located at 113 East Wayne Street, South Bend, Indiana 46601, permit number RR71-02356 (“Permittee”), holds a type 210 Alcohol and Tobacco Commission (“Commission” or “ATC”) permit. The application for renewal of permit was assigned to the St. Joseph County Local Alcoholic Beverage Board (“Local Board”). On September 22, 2004, the Local Board heard the application for renewal of permit request and on that same day, voted 4-0 to deny renewal of said permit. The Commission adopted the Local Board’s recommendation on October 5, 2004. The Applicant filed a timely Notice of Appeal and the matter was assigned to Commission Hearing Judge U-Jung Choe (“Hearing Judge”). The matter was set for hearing on August 25, 2005, and at that time, witnesses were sworn, evidence was heard, and matters were taken under advisement. The Hearing Judge, having reviewed the tape-recorded transcript, the evidence submitted to the Commission during the appeal hearing and the contents of the entire Commission file, now tenders her Proposed Findings of Fact and Conclusions of Law for recommendation to the members of the Commission.

## II. EVIDENCE AT HEARING

A. The following individuals testified before the Commission in favor of the Permittee in this cause:

1. Charles Hammons, president of C.H. McCloud Corporation;
2. Timothy Shelby, prospective purchaser of C.H. McCloud Corporation; and
3. Charles Leahy, attorney for Timothy Shelby.

B. The following exhibits were introduced and admitted before the Commission in favor of the Permittee:

1. Exhibit A - The Library promotion;
2. Exhibit B – Affidavit of Rodney Avery;
3. Exhibit C – Affidavit of Mike Speth;
4. Exhibit D – The Library security video tapes;
5. Exhibit E – C.H. McCloud’s Closing Statement; and
6. Exhibit F – C.H. McCloud’s Response to City’s Submission in Opposition to Renewal of the Library Permit.

C. The following individuals testified before the Commission against the Permittee in this cause:

1. Officer John Mortakis, South Bend Police Department

D. The following exhibits were introduced and admitted before the Commission against the Permittee in this cause:

1. Exhibit A - Agreement for Purchase and Sale of Stock between Charles A. Hammons and Timothy Shelby, dated June 15, 2005;
2. Exhibit B – Liquor License Buy/Sell Agreement between C.H. McCloud Corporation and Timothy Shelby, dated March 31, 2005;
3. Exhibit C – e-mail message of Captain Phillip A. Trent, South Bend Police Department, dated February 4, 2004;
4. Exhibit D – transcript of Indiana Alcohol & Tobacco Commission Appeal Hearing, August 28, 2002;
5. Exhibit E – Affidavit of Aladean M. DeRose;
6. Exhibit F – *South Bend Tribune* article “Charges Dropped Against South Bend Policemen,” dated September 1, 2005;
7. Exhibit G – *South Bend Tribune* article “Business Associates Accuse Police Officer of Wrongdoing,” dated September 12, 2005;
8. Exhibit H – City of South Bend’s Submission in Opposition to Renewal of the Library Permit; and
9. Exhibit I – City of South Bend’s Memorandum of Law in Support of Permit Denial.

### **III. FINDINGS OF FACT**

1. The Permittee, C.H. McCloud Corporation, d/b/a The Library Irish Pub, located at 113 East Wayne Street, South Bend, Indiana 46601, permit number RR71-02356, is the holder of a type 210 ATC permit. (ATC File)
2. Permittee filed with the Commission its application for renewal of permit at the above location that was subsequently referred to the Local Board. (ATC File)
3. On September 22, 2004, the Local Board recommended denial of Permittee's application for renewal of permit by 4-0 vote and found by substantial evidence that it should not be entitled to the ATC permit. (ATC File; Local Board Hearing)
4. At the Local Board hearing, the members were persuaded by the evidence that the Permittee had allowed its premises to become a public nuisance by allowing minors to be present on the licensed premises. (Local Board Hearing)
5. Credible evidence supports the Local Board's recommendation. (Local Board Hearing)
6. On October 5, 2004, the Commission adopted the recommendation of the Local Board. (ATC File)
7. The Hearing Judge took judicial notice of the entire Commission file, including, but not limited to, the Local Board transcript, the ATC file and the application for renewal of permit at issue. (ATC Hearing)
8. On April 25, 2003, the Indiana State Excise Police conducted an enforcement action and 51 persons were cited for the offense of Minor in Tavern, while a total of 75 citations were issued. (ATC file; Remonstrator's Exhibit H) Thereafter, the permit premises was shut down for 30 days by agreement between the Permittee and the Commission. (ATC File; Permittee's Exhibit F)

9. On June 25, 2003, the Local Board heard Permittee's application for renewal of its permit. At that time, Charles Hammons ("Hammons") appeared with attorney Don Wertheimer and was accompanied by a potential purchaser Cindy McGowan ("McGowan"). Mr. Wertheimer stated that due to the problems with minors, Hammons desired to surrender and transfer his permit to McGowan and the Local Board approved renewal conditioned upon Hammons' transfer of the permit to McGowan within 90 days. (ATC File; Remonstrator's Exhibit H)

10. The permit transfer to McGowan never occurred and on September 3, 2003, Hammons and Cynthia J. Hammons entered into an agreement to sell the said permit to Darrell Austin ("Austin"). (Remonstrator's Exhibit H; ATC Hearing)

11. Permittee and Austin executed Manager's Questionnaire allowing Austin to manage the permit premises pending the license transfer. On the first and only weekend Austin managed the permit premises, he engaged in illegal and impermissible activities such as selling cigarettes without a permit, distributing improper advertisements and bringing alcohol beverages that were not purchased through proper channel to the licensed premises. (Permittee's Exhibits, B, C, and D; ATC Hearing) Thereafter, Hammons rescinded his agreement with Austin. (Remonstrator's Exhibit H; Testimony of Hammons)

12. The City of South Bend Police Department received calls from parents in late January or early February 2004, that "their under-age children have been welcome and serviced [sic] inside The Library Bar." (Remonstrator's Exhibit C)

13. On April 16, 2004, a night when Hammons was personally present, the Indiana State Excise Police conducted an investigation of The Library Pub and found that 19 minors were in the bar; four of the eight minor women on site reported that they had not been asked for

identification at the door. (ATC File; Permittee's Exhibit E; Remonstrator's Exhibit H)

Thereafter, the Commission proposed, and the Permittee accepted and served a seven-day suspension. (ATC File; Permittee's Exhibit F)

14. The violation of April 16, 2004 is Permittee's second violation within one year. (ATC File)

15. The City of South Bend has at least five colleges and universities within or near its corporate boundaries and the City of South Bend has a legitimate interest in deterring alcohol consumption by minor students. (Testimony of Mortakis)

16. The Library is located in the downtown part of the City of South Bend, an area where the City has experience significant problems with crowding and unruliness of downtown bar patrons. The local neighborhood and the community as a whole would not benefit from the renewal of said permit. (ATC Hearing; Local Board Hearing; ATC File; Testimony of Mortakis)

17. The City of South Bend's remonstrance and objection to non-renewal of the said permit was formulated during meetings of the Mayor's Neighborhood Task Force in which several City Departments participate, and The City's remonstrance was not unilateral action by the Chief Assistant City Attorney. (Testimony of Mortakis)

18. Since approximately June 15, 2005, Hammons turned over operation of the licensed premises to Timothy Shelby ("Shelby"), who has paid Hammons approximately \$25,000 for all assets except the liquor permit, which is separately valued at \$11,000 and which is payable upon transfer. (ATC Hearing)

19. Permittee did not notify the Commission that The Library had a new manager as of June 16, 2005, and as of August 24, 2005, the required Manager's Questionnaire had not been filed. (ATC File; ATC Hearing)

20. On August 24, 2005, the Permittee was cited for violating 905 IAC 1-12.1-2 (No Record of Employee Permit), 905 IAC 1-20-1 (No Minimum Food Requirements) and IC 7.1-5-9-15 (No Manager's Questionnaire on File). (ATC File)
21. The facts and substantial evidence favor supporting the denial of permit renewal. (ATC Hearing; Local Board Hearing; ATC File)
22. The Commission may grant or refuse the permit application accordingly as it deems the public interest will be served best.
23. The Commission has the responsibility to regulate alcoholic beverages in a manner consistent with the desires of local communities.
24. Any finding of fact may be considered a conclusion of law if the context so warrants.

#### **IV. CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over this matter pursuant to IC 7.1-1-2-2 and 7.1-2-3-9.
2. The permit application was properly submitted pursuant to IC 7.1-3-1-4.
3. The Commission is authorized to act upon proper application. *Id.*
4. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the local board. 905 IAC 1-36-7(a).
5. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission, including a public hearing and a review of the record and documents in the Commission file. IC 7.1-3-19-11(a); 905 IAC 1-36-7(a), -37-11(e)(2); *see also* IC 4-21.5-3-27(d).
6. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon the substantial and

reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 IAC 1-37-11(e)(2); IC 4-21.5-3-27(d).

7. An alcoholic beverage permit is a privilege in the State of Indiana and its continued possession is conditioned upon the holder's compliance with the law.

8. Allowing minors to be present in a tavern on two known dates within a twelve-month period of time contrary to IC 7.1-5-7-10 constitutes a public nuisance per IC §§ 7.1-1-3-33, 7.1-2-6-1 and 7.1-2-6-2. Permittee has allowed its premises to become a public nuisance and this is a basis to deny renewal of a permit. 905 IAC 1-27-2.

9. In determining permittee's eligibility to continue to hold a permit, the Commission shall consider the good moral character and good repute of the permittee, including whether acts or conduct of the permittee would constitute conduct prohibited by the Indiana Penal Code and such assessment of character as may be reasonably inferred from police reports, and evidence admitted in Commission proceeding or other sources of information permitted by IC 7.1-3-19-8 and 7.1-3-19-10. 905 IAC 1-27-1.

10. Since the time the Local Board denied renewal of the permit, Hammons has allowed the premises to be operated by a non-permittee and had not filed a Manager's Questionnaire as of August 24, 2005 contrary to IC 7.1-5-10-3.

11. The record permits a reasonable inference that Hammons is not a person of good moral character and repute, in that he was present at the licensed premises when both violations of minors on premise occurred within a one year period and he had a pattern of allowing minors to enter the premises without presenting identification. 905 IAC 1-27-1.

12. It is immaterial to the issue of renewal of this permit whether Hammons' intended transferee, Timothy Shelby, is or would be a good manager, or whether he would incur financial loss should the permit not be renewed.

13. Based on the entire record, the Local Board's decision to deny the permit is based on reasonable and sound evidentiary support and is, therefore, supported by substantial evidence. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.* 615 N.E.2d 100, 104 (Ind. App. 1993).

14. The Commission is charged to uphold local board action on a permit application unless upon review that action runs contrary to the well-established provisions of Indiana Code 7.1 and 905 Indiana Administrative Code.

15. The Commission shall follow the Local Board unless upon review of that recommendation it finds that to follow that recommendation would be (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence. Ind. Code § 7.1-3-19-11.

16. The finding of the Local Board that this permit should not be renewed and the subsequent Commission action adopting the Local Board's recommendation was not (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence. *Id.*

17. Any conclusion of law may be considered a finding of fact if the context so warrants.



THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the finding of the Indiana Alcohol & Tobacco Commission in denying the renewal application for the Permittee, C.H. McCloud Corporation, d/b/a The Library Irish Pub, located at 113 East Wayne Street, South Bend, Indiana 46601, permit number RR71-02356, was based on substantial evidence and must be sustained. It is further ordered, adjudged, and decreed that the evidence adduced at the ATC appeal hearing was not sufficient to overturn the recommendation of the St. Joseph County Alcoholic Beverage Board, or to issue a finding in favor of the Permittee and against the recommendation of the Local Board. The appeal of Permittee is hereby DENIED and the recommendation of the Local Board in this matter is UPHELD.

DATED: \_\_\_\_\_

\_\_\_\_\_  
U-Jung Choe, Hearing Judge  
Indiana Alcohol & Tobacco Commission